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No. .....

In the Supreme Court
of the United States

JANUARY TERM, 1984

CARL J. MOLLNOW,
Petitioner,

v.

PAUL K. CARLTON, et al,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether military servicemen may sue their superior officers for damages resulting from constitutional violations of their civil rights when no alternative remedy is available or adequate.

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* The complaint named as defendants, in addition to Paul K. Carlton, individually and as General USAF, Commander MAC (Scott AFB); J. F. Gonge, individually and as Major General USAB, Commander 22AF (Travis AFB); William Lyon, individually and as Major General USAF, Chief of Air Force Reserve; General Kearney, individually and as Commander 21AF (McGuire AFB); Edward J. Nash, individually and as Colonel USAF, Commander 62 MAW (McChord AFB); Donald F. Beyl, individually and as Colonel USAF, Commander 446 MAW (Reserve Association) (McChord AFB); Henry Vandepol, individually and as Colonel USAF, Air Force Reserve Surgeon (Warner-Robins AFB); Herbert V. Swindell, individually and as Colonel USAF, Surgeon MAC (Scott AFB); Thomas C. Richards, individually and as Colonel USAF, Commander Air Force Reserve Personnel Center; Paul A. Wriggle, individually and as Colonel USAF, Commander, Chief of Operations 446 MAW (McChord AFB); William M. Dyer, Jr., individually and as Lt. Col. USAF, Director of Base Medical Services (McChord AFB); Daniel G. Nelson, individually and as Major USAF, 446 MAW (McChord AFB); Eric H. Jensen, individually and as Major USAF, 446 MAW Flight Surgeon (McChord AFB); and Richard T. Nist, individually and as Captain USAF, 446 MAW Flight Surgeon (McChord AFB).

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JANUARY TERM, 1984

CARL J. MOLLNOW,
Petitioner,

v.

PAUL K. CARLTON, et al,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

The Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 20, 1983.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at _____ F.2d _____ and appears in Ap-

pendix A hereto. The opinion of the District Court is unreported and appears in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was entered September 20, 1983. This Petition for Writ of Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, First Amendment, Freedom of Speech and Petition clauses:

> [O]r abridging the freedom of speech, * * * and to petition the Government for a redress of grievances.

United States Constitution, Fifth Amendment, Due Process Clause:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

United States Constitution, Thirteenth Amendment:

> Section 1. Slavery and involuntary servitude abolished.
>
> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

Section 1985. Conspiracy to interfere with civil rights.

First. If two or more persons in any state or territory conspired to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any state, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Third. If two or more persons in any state or territory conspired * * * for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws * * * in any case of conspiracy set forth in this section, of one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Section 1986. Action for neglect to prevent conspiracy.

Every person, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section [42 U.S.C. § 1985] are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action * * *. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

STATEMENT OF THE CASE

The Court of Appeals affirmed dismissal of the Complaint upon the claim that the doctrine in *Feres* v. *United States*, 340 U.S. 135 (1950) renders the individual military defendants absolutely immune from damage actions by fellow servicemen. Petitioner Mollnow's causes of action are based upon the conspiracy of fourteen fellow officers to prevent him from carrying out his duties of office and to deprive him of his constitutionally protected rights. In the first and principal cause of action, Petitioner has alleged a violation

of 42 U.S.C. § 1985(1) as the Defendants conspired to molest, interrupt, hinder and impede him from carrying out the lawful discharge of his duties of office while he was stationed in Seattle, Washington. Alternatively, the complaint alleges a 42 U.S.C. § 1985(3) claim and two direct constitutional or *Bivens*-type claims.

A. Prior to Petitioner's rights being violated

Petitioner has served approximately twelve years in the United States Air Force (USAF) as an officer attaining the rank of major. He had trained and qualified as an aircraft pilot experienced to fly 4-engine jet transport aircraft. Petitioner became so experienced and competent in his job that the USAF promoted him to "instructor pilot". Only a select group or a small percentage of USAF pilots attained the status of "instructor pilot". However, even more select are the few instructor pilots who are chosen to be instructor pilots at the Military Airlift Command Instructor Pilot School. Petitioner achieved even that high accolade. In addition, he had been repeatedly evaluated by his commanding officers as an "outstanding" USAF officer and pilot in his Officer Evaluation Reports. In essence, Petitioner was a "top of the line" officer and pilot.

B. Petitioner attempted to carry out his duties of office

In accordance with the requirements of a USAF officer, senior pilot and instructor pilot, Petitioner

identified unsafe aircraft situations and policies. One of these flight safety reports included a warning that a C-141 military cargo aircraft would probably crash into the Olympic Mountains in the State of Washington. Petitioner used this example to illustrate what would happen if these flight safety problems were not resolved. He not only pointed out the obvious unsafe conditions, but he also suggested relatively simple changes that would prevent such possible crashes and resulting loss of human life. The changes were not imposed and the subsequent C-141 crashes proved embarrassing to Petitioner's superiors.

The Defendants ordered Petitioner to retract these flight safety reports or be summarily declared mentally incompetent and grounded from pilot-flight status forever. When Petitioner refused to retract the reports, he was ordered to take a psychiatric examination at a nearby United States Army Hospital. Petitioner underwent the psychiatric examination as ordered and was found mentally competent, not suffering from mental disease, and fully qualified to resume duties as an officer and active duty pilot.

A joint civilian-military board was then formed to investigate one of the C-141 crashes. This military cargo aircraft crashed into the Olympic Mountains of the State of Washington in a manner nearly identical to the example described in Petitioner's flight safety reports. Numerous deaths were a result of this crash. The investigation board learned of the existence of

Petitioner's reports and sought to have his testimony. As a result, the Defendants clandestinely suppressed the reports and ultimately imprisoned Petitioner in a military psychiatric ward in Texas to prevent him from testifying or commenting on his reports.

C. Defendants succeed in depriving Petitioner of his constitutionally protected rights

Petitioner was then downgraded as a pilot, taken off active duty status, and ordered to take a new psychiatric examination with a USAF psychiatrist in Texas. He was also denied access to his own military records, and these records were classified "sensitive". Petitioner now sought to protect his rights by submitting, pursuant to USAF regulations and the Uniform Code of Military Justice (UCMJ), a "Complaint of Wrongs" to his commanders (Defendants). Thereafter, Petitioner was sent to Lackland Air Force Base in Texas, while in civilian status, for the alleged USAF psychiatric examination. The Defendants, however, contacted the commander of the Texas psychiatric ward, and by letter admitted:

> "This is a very difficult case in which command is intensely interested. A major problem is the apparent difficulty in administratively removing an officer in a reserve organization from flying duty or even ground duty *due to political pressures.*" (Emphasis added).
>
> "Since the recent 62 MAW C-141 crash in the Olympic Mountains of Washington on 20 March 75, this case has really become a political football. A friend

> of Maj. Mollnow's wrote letters to the press, TV/ Radio stations, congress, etc. concerning poor safety practices in the Air Force * * *. There is current congressional interest concerning this * * *."

This letter, attached as Exhibit "A" to Plaintiff's Complaint goes on to identify the Defendants as being the parties "intensely interested" in declaring Plaintiff insane and discharging him from the USAF.

As a result, Petitioner was not examined at Lackland Air Force Base, but instead, was immediately imprisoned in the psychiatric ward, subjected to physical and mental torture, and classified as a "particularly dangerous or harmful psychiatric patient." Upon various independent inquiries, the head psychiatrist was eventually motivated to release the Petitioner. Thereafter, Defendants conspired in the common scheme of causing Petitioner's involuntary discharge from the USAF.

The complaint identifies that all of the Defendants' conduct was outside the established and sanction structure of military discipline and "outside the scope of their authority as officers in the United States Air Force." The UCMJ establishes the full extent of discipline within all branches of the military. This Code also provides the methods for servicemen to seek redress for their grievances. *Chappell* v. *Wallace*, — U.S. —, 103 S. Ct. 2362, 2366 (1983).

Petitioner has alleged that the Defendants prevented him from being able to seek redress under the

UCMJ, USAF regulations, and other applicable United States Code provisions. He repeatedly submitted "Complaint[s] of Wrongs" to every officer up through the chain of command. Defendants destroyed and refused to process each of these reports and requests for UCMJ and regulation review. They threatened to declare Petitioner mentally incompetent if he did not retract his reports and complaints. They ordered him not to contact his civilian governmental representatives, the press, nor to petition the government. The Defendants intentionally interfered with a joint civilian-military investigation of one of the aircraft crashes foreseen by the Petitioner. They ordered Petitioner not to testify and inform witnesses at the hearing that the Petitioner was not completely sane. Defendants clandestinely shipped Petitioner to Texas for the purposes of preventing him from testifying at the investigation and to keep him from submitting any more requests for review under the UCMJ. He was not given a psychiatric examination, but instead, was imprisoned in the ward and subjected to the persuasion of physical and mental torture.

Petitioner refused to submit to these coercive acts and consistently maintained his demands to carry out his duties of office and seek his rights under the UCMJ, USAF regulations, and other appropriate United States Code provisions. The Defendants responded by depriving him of access to UCMJ proceedings and made him a *persona non grata* without any opportunity for

review or appeal. In Petitioner's subsequent involuntary discharge, he was precluded from any opportunity for redress from the above events.

Petitioner's Complaint represents the only remedy he has ever had for the deprivation of his constitutional rights. No other remedy has been available or adequate. Further, Petitioner has alleged that at no time did any of the above events concern the United States in a war effort, activity, or involve national or military security. Petitioner's job was merely transporting material goods from one military facility to another. This funtion is directly similar to the civilian cargo transportation business. All flight safety reports addressing aircraft activities are similar to safety regulations governing the Federal Aviation Administration (FAA).

REASONS FOR GRANTING THE WRIT

The Court of Appeals, alone among the appellate courts, has held that a serviceman may not sue his superior officers for damages for constitutional violations under any possible circumstances. The servicemen may not seek federal court relief even where the superior officers clandestinely prevented any remedy or review for the constitutional violations normally available under military regulations and the UCMJ. No claims may be raised against the offending officers even though they have intentionally usurped the authority and intention of Congress to make an adequate remedy available. This unwarranted extension of *Chappell* v. *Wallace*, 103 S. Ct. 2362 (1983), presents

a significant threat to the civil rights of a substantial percentage of American citizens, as well as, a threat to the exclusive military disciplinary system authorized by Congress. Because the Court of Appeals has incorrectly resolved an issue of great practical importance to servicemen, the armed forces and Congress, review by this Court is warranted.

1. Certiorari should be granted to decide the unsettled issue of whether military servicemen may sue their superior officers for violations of their constitutionally protected rights when such officers completely deprive them of any other form of redress or review, including a denial of access to redress under military regulations and the Uniform Code of Military Justice.

The opinion of the Ninth Circuit found that *Chappell* v. *Wallace*, 103 S. Ct. 2362 (1983) establishes a complete bar to actions by servicemen against their superiors. Even where the Defendants successfully conspired to deprive Petitioner of all internal military procedures and redress, the court determined that there was "* * * no room in *Chappell* to consider the adequacy [or availability] of the intraservice remedy." The Court applied this rationale to all claims, including the *Bivens*-type claims and the claim raised under 42 U.S.C. § 1985(1).

The court did state that it was troubled by Petitioner's allegations that "* * * his repeated 'Complaint[s] of Wrongs' were ignored by every officer up through the chain of command, thus preventing his

access to proper UCMJ review." Even though Petitioner had adequately alleged such a complete deprivation of any remedy or review for his grievances, the court felt compelled under *Chappell* v. *Wallace* to ignore it.

a. The grant of immunity in *Chappell* v. *Wallace* is limited to an evaluation of availability and adequacy of the UCMJ and regulatory remedies.

The plaintiffs in *Chappell* v. *Wallace* alleged that as a result of racial discrimination they were subjected to unusually severe penalties, undesirable duty assignments and low performance evaluations. All of these acts were conducted within the established administrative structure of the military and are directly subject to review under the UCMJ. The Court, however, did not grant immunity against all the allegations. C. J. Burger noted that a remand to the Court of Appeals was necessary to determine "* * * whether the portion of respondents' suit seeking damages flowing from an alleged conspiracy among petitioners in violation of 42 U.S.C. § 1985(3) can be maintained." *Chappell* v. *Wallace*, 103 S. Ct. at 2368, n. 3.

Remand is necessary in *Chappell* v. *Wallace* because the court of appeals could not tell from the record whether the district court treated the motion as one for dismissal or summary judgment. This is relevant to a 42 U.S.C. § 1985 action as the respondents submitted documents "* * * evidencing exhaustion of various military remedies." *Wallace* v. *Chappell*, 661 F.2d 729, 731, n. 2 (1981). The petitioners apparently disputed

this issue of exhaustion. In effect, the *Chappell* v. *Wallace* opinion on immunity was based on the availability and adequacy of the UCMJ as a remedy. Therefore, where the military remedies are unavailable or exhausted without an adequate remedy, a 42 U.S.C. § 1985 action for damages could lie against military defendants. This requirement of an "adequate compensable remedy available" is consistent with the doctrine in *Feres* v. *United States*, 340 U.S. 135 (1950), which created the essential elements for immunity. Various federal laws and military benefits usually provided injured personnel with adequate compensation for death or injury. *Feres* v. *United States*, 340 U.S. at 144-146. Subsequently, the lower courts viewed the Veterans' Benefits Act as one of the "substitutes" for liability of servicemen negligence. *Citizens Nat. Bank of Waukegan* v. *United States*, 594 F.2d 1154, 1156 (7th Cir. 1979). In *Matteos* v. *United States*, 412 F.2d 793 (9th Cir. 1969), the court stated at 794; "* * * as in *Feres* the availability of compensation for injuries incurred in military service render such intrusion unnecessary."

In evaluating the availability of the UCMJ as a remedy, *Chappell* v. *Wallace* has already identified the scope of the remedy and its place within the military. Clearly, C. J. Burger was concerned about the maintenance of military discipline and regulations. Civilian courts, he felt, "* * * must, at the very least, hesitate long before entertaining a suit which asks the court

to tamper with the established relationship between enlisted military personnel and their superior officers * * *." *Chappell* v. *Wallace*, 103 S. Ct. at 2365.

But what is that "established" military structure? It is not merely any act of any officer in uniform. Chief Justice Warren has stated that "* * * our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.* * *" E. Warren, *The Bill of Rights and The Military*, 37 N.Y.U.L. Rev. 181, 188 (1962). C. J. Burger identified this structure as the codified conduct and processes for review embodied in the UCMJ. Congress, having plenary constitutional authority over the military, has enacted the UCMJ "* * * to regulate military life, taking into account the special patterns that define the military structure." *Chappell* v. *Wallace*, 103 S. Ct. at 2366. Effectively, all the concerns of military uniqueness and expertise in military discipline are encompassed in the UCMJ. It sets all the standards.

Indeed, the law review article authored by then Chief Justice Earl Warren set forth the origins and congressional purpose for the UCMJ. Chief Justice Warren pointed out that in 1951, as "another guardian of the Bill of Rights," Congress adopted the UCMJ as "* * * a diligent effort by Congress to ensure that military justice is administered in accordance with the demands of due process." E. Warren, supra at 188. After analyzing the refusal of the nation's founding fathers to allow an autonomous military, Chief Justice

Warren concluded that civilian control and constitutional protections of fundamental rights are within the very fabric of the Constitution. E. Warren, supra at 184-188.

Essentially, *Chappell* v. *Wallace* announced that for most servicemen grievances Article 138 (the "Complaint of Wrongs") of the UCMJ (10 U.S.C. § 938) provides an adequate remedy under the *Feres* doctrine. Of course, this article provides the only victim oriented relief under the UCMJ. The only question remaining as to the satisfaction of this element is whether the relief contemplated by military remedies was actually available to the serviceman.

b. The *Feres* doctrine of immunity does not apply against Petitioner because the necessary elements of *Feres* were not satisfied.

The coercive and injurious conduct of the Defendants was carried on outside any authorized military disciplinary process. No opportunity for review of the punishment was made available to the Petitioner. In direct contrast to *Chappell* v. *Wallace*, Petitioner was not disciplined under any provision of the UCMJ. Every alleged act of deprivation of fundamental constitutional rights was clandestine in nature and clearly fell outside the "legitimate" scope of established disciplinary structures. The Petitioner was instructed to retract his reports, not to contact his congressional representatives, not to petition the government and not to testify at a duly created civilian-military investiga-

tion board. After his flight safety reports became known, Defendants suppressed the reports and Petitioner by shipping him to a USAF psychiatric ward and immediately imprisoning him there without prior examination or notice.

This case does not involve an issue of the military needing to be able to discipline servicemen. The legitimate method is there, fashioned under authority of Congress by the military itself to serve its own needs. These individual Defendants could not carry out their conspiracy within the legitimate disciplinary structure because their purpose was outside the scope of their duties and a violation of constitutional law. Any application of the UCMJ to Petitioner would have exposed the Defendants to extreme professional embarrassment. Thus, Defendants conspired to coerce Petitioner by clandestine means and deprived him of access to relief under the UCMJ, military regulations and other provisions of the United States Code.

As previously pointed out, Defendants engaged in conduct that was outside the authorized disciplinary structure. Their own acts were not part of the UCMJ process and, therefore, not giving rise to an opportunity for due process review. However, the UCMJ also provided a victim initiated form of relief under Article 138. 10 U.S.C. § 938. Again, the Defendants successfully conspired to prevent the Petitioner from obtaining relief under Article 138. Petitioner thoroughly exhausted this potential remedy by filing a "Complaint

of Wrongs" with each of his successive commanding officers until he reached his highest commanding officer. In each of these instances, the "Complaint of Wrongs" was rejected, an investigation was refused and no relief or review was granted. In fact, after submitting his "Complaint of Wrongs" the Petitioner was subjected by Defendants to even greater severity of coercion and injury.

Here, the Petitioner has no adequate compensable remedy available and an intrusion to the *Feres* doctrine is now necessary. Petitioner is not eligible for military hospitalization, nor could any hospital cure him of his injuries for being wrongfully accused of being insane, loss of ability and expertise to fly jet aircraft, deprivation of his office as a federal official, prevention of his ability to exercise his rights to free speech and petition the government, and the destruction of his reputation.

Nor can Petitioner find compensable relief in pension and retirement benefits as none of these are available to him. Nor can Petitioner benefit from the Veterans' Benefit Act for he does not qualify for compensable total and permanent physical injuries, death or chronic disease under 38 U.S.C. §§ 301-521. In essence, with the preclusion of redress under the UCMJ, no military benefit program provides for relief from injuries arising out of a conspiracy to deprive a person of his constitutional rights.

The other principal element of *Feres* is also missing in this case. Petitioner was not on "active duty" during

the essential deprivations of fundamental rights alleged in the Complaint. Petitioner's allegations identified that subsequent to the C-141 aircraft crash he was downgraded from flight status, dropped from active duty status and barred from entering any USAF installation. Further, the Complaint specifically states that Petitioner was sent by Defendants "* * * as a civilian and not as a member of the U.S.A.F. to Lackland Air Force Base, Texas * * *" for an alleged psychiatric evaluation, whereupon, Petitioner was immediately imprisoned and classified in a psychiatric ward as a "particularly dangerous and harmful psychiatric patient." The entire confinement period, as well as the travel period from Washington to Texas involved Petitioner in his "civilian status."

After Petitioner's reports became known, the Defendants suppressed Petitioner by downgrading him from active duty into a status *persona non grata*. This status continued throughout the remainder of all the allegations until Petitioner was involuntarily discharged. It should be pointed out that the gravamen of his cause of action lies in the fact that this was not an event of imprisonment, but was an event to intimidate and coerce the Petitioner from exercising his rights to freedom of speech, petition the government, and from carrying out his duties of office under the United States. The *Feres* doctrine of intraserve immunity does not apply to the events occurring while Petitioner was not on "active duty" status. *Feres* v. *United States*, 340

U.S. at 143; *United States* v. *Brown*, 348 U.S. 110 (1954); *Martinez, Administratrix* v. *Shrock*, 430 U.S. 920 (1976).

2. Civilian judicial review is essential to prevent a cadre of individuals from usurping the authority and intention of Congress to insure due process and make adequate review available through the application of the United States Codes.

The Constitution allows for the creation of a military to serve the nation. Art. I, § 8, cls. 12-14. However, the military is not a nation onto itself. It falls under direct civilian administrative control by the executive branch of government and its functions and structure are codified by Congress. Art. I, § 8, cls. 12-14; *Chappell* v. *Wallace*, 103 S. Ct. at 2365-2366. If a small renegade cadre of individuals within the military can successfully usurp the authority of both Congress and the executive branch, the military review provisions of the United States Code would be rendered meaningless. Further, there is no provision in the Constitution which bypasses Congress and delegates authority directly to any individual in the military to arbitrarily strip a fellow serviceman of all fundamental rights.

The congressional codification of the military structure, review process and functions was to balance constitutional limitations with the need for a "unique structure of the military establishment." *Chappell* v. *Wallace*, 103 S. Ct. at 2365. These codes, including the UCMJ, preserve constitutional due process, the unique-

ness necessary for an effective military structure, and control "* * * rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures and remedies related to military discipline * * *." *Chappell* v. *Wallace*, 103 S. Ct. at 2366; E. Warren, supra at 188. In exercising its "plenary constitutional authority over the military" Congress has established the current "comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure." *Chappell* v. *Wallace*, 103 S. Ct. at 2366.

The Supreme Court, in turn, has consistently relied upon the availability and use of this comprehensive internal system when justifying its refusal to review activities within the military. *Feres* v. *United States*, 340 U.S. at 144-146; *Chappell* v. *Wallace*, 103 S. Ct. at 2366-2367. The absence of any specific congressional damage remedy for claims by military personnel that constitutional rights have been violated by superior officers must be viewed in light of Congress's belief that it had installed an adequate alternative remedy. *See, Citizens Nat. Bank of Waukegan* v. *United States*, 594 F.2d 1154, 1156 (7th Cir. 1979); *Matteos* v. *United States*, 412 F.2d 793, 794 (9th Cir. 1969).

If Congress had failed to provide any form of disciplinary and remedial structure for the military, an enormous gap in constitutional protections would have existed. In the past, civilian courts were inclined to provide damage remedies to mend that gap. *Wilkes* v.

Dinsman, 7 HOW. 89 (1849), 12 HOW. 389 (1851); *see*, C. J. Burger's comment on its admitted availability being superseded by the "significant changes * * * establishing a comprehensive system of military justice," *Chappell* v. *Wallace*, 103 S. Ct. at 2368, n. 2. Hypothetically, the absence of a congressionally adopted comprehensive military system would necessitate the application of *Bivens*-type actions for violations of constitutionally protected rights. *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 410 (1971). The "special factors counseling hesitation" would be absent. *Bivens* v. *Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. at 396; *Chappell* v. *Wallace*, 103 S. Ct. at 2367. The same substantive analysis must be applied where the constitutionally injured serviceman is effectively precluded from any access to the congressionally adopted comprehensive military system.

With such a comprehensive system, how can any serviceman be completely precluded from the congressionally adopted forms of relief? The answer is simple and focuses upon the inherent defect in Article 138 and the other applicable code provisions. The congressional forms of military review and relief are all based upon the premise that the trier of fact would be unbiased and without a conflict of interest. The military chain of command serves as prosecutor, judge and jury under Article 138. 10 U.S. C. § 938; *see also* chain of command review under 10 U.S.C. § 815(e). In most cases, a wrongful act by a superior officer will be reviewable

by an unbiased officer at the next higher level of command. However, where each member of the chain of command is biased and has a vested interest to prevent Petitioner from obtaining lawful review of his grievances under the UCMJ, the system fails because it cannot be applied.

Petitioner has adequately alleged complete preclusion from the authorized military review systems. Due to the extreme sensitivity of his reports, he was intentionally denied the processing of his "Complaint[s] of Wrongs" by each member of his chain of command. He was denied review of these grievances during his involuntary dismissal from the service. Further, the Secretary of the Air Force has also rejected review.

A citizen of this country cannot be entirely stripped of all rights without application of due process. Justice White has stated that "[o]ur system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law." *Butz* v. *Economou*, 438 U.S. at 506. As Petitioner was denied any remedy within the military, his only remaining recourse was to file civil rights claims in a civilian court. The *Marbury* v. *Madison* court emphasized the importance of providing such a remedy for constitutional violations by stating: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." 1 Cranch 137, 163, 2 L. Ed. 60 (1803); *Bivens* v. *Six Unknown Named*

Agents of Federal Bureau of Narcotics, 403 U.S. at 398. Indeed, C. J. Burger stated in *Chappell* v. *Wallace* that "[t]his Court has never held, nor do we now hold, that military personnel are barred from redress in civilian courts for constitutional wrongs suffered in the course of military service." 103 S. Ct. at 2367.

The policy reasons for review of this case by a civilian court are quite strong. A small cadre of individuals have stepped outside their statutory authority and usurped the powers of Congress. This is not a case of the civilian courts interfering with "the military establishment's power to deal with its own personnel." *Chappell* v. *Wallace*, 103 S. Ct. at 2368. This is a case of the courts being needed to insure that the authorized military establishment maintains the opportunity to govern its personnel. Under Congress's statutory scheme there is no other enforcement power besides the civilian judiciary to review these circumstances. Congress may later choose to provide an independent review authority in these circumstances, or it may continue to rely upon review by civilian courts. A judicial review in this case will not disrupt discipline or undermine military decision making. It will enforce it by assuring that all superior officers will follow the congressionally established military framework.

The consequences of the judiciary ignoring these inherent defects are nearly limitless. The possibility of unbridled renegades within the military may easily affect large numbers of personnel, as well as, establish

an opportunity for isolated and unauthorized military functions that could pose a threat to national security in this nuclear age. From 1976 to 1981, the total active duty military personnel has fluctuated between 2,027,-000 and 2,083,000. This represents over 9% of the entire population of this country. U.S. Department of Defense, *Selected Manpower Statistics*, annual; Statistical Abstract of the United States, 103rd Ed., Chart No. 590 at 359 (1982-1983). The USAF Air Transport Command (as opposed to all other forms of military aircraft) has identified that its flight safety record is "disappointing!" In 1982 alone, it has incurred 1.3 accidents or crashes per 100,000 flying hours. This represents the death of 54 crewmen and passengers, and totals over $16,000,000 in equipment cost. The MAC Flyer, at 8-9 (April, 1983). In contrast, the comparable civilian air transport services incurred only .0066 accidents or crashes per 100,000 flying hours, resulting in only 4 deaths. Statistical Abstract of the United States, 103rd Ed., Chart No. 1102 at 635 (1982-1983). The Court should be cognizant that it is important to this nation's interests to assure that the entire congressionally adopted military reporting and review system, which includes Petitioner's duties of office on flight safety, be maintained and followed.

CONCLUSION

Petitioner's Complaint states a claim for relief principally under 42 U.S.C. § 1985(1) and *Bivens*-type claims for violation of constitutionally protected rights.

The statutory remedies envisioned as being available to military personnel in *Chappell* v. *Wallace*, were the very proceedings barred to the Petitioner. The United States government has not been sued. The Complaint only names the individual officers who conspired to preclude access to the authorized military system of discipline and review. Petitioner requests this Court to again embrace the often quoted passage:

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *United States* v. *Lee*, 106 U.S. 196, 220 (1882); *Marbury* v. *Madison*, 1 Cranch 137 (1803); *Scheuer* v. *Rhodes*, 416 U.S. 232, 239-240 (1974).

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARL J. MOLLNOW, *Plaintiff-Appellant,*	)	No. 80-3452
v.	)	D.C. No. C 79-127 T
PAUL K. CARLTON, et al., *Defendants-Appellees.*	)	OPINION

On Appeal from the United States District Court
for the Western District of Washington
The Honorable Jack E. Tanner, District Judge,
Presiding

Argued January 8, 1982;
Submitted September 20, 1983

Before: ANDERSON and ALARCON, Circuit Judges,
and CRAIG,* District Judge.

J. BLAINE ANDERSON, Circuit Judge:

Mollnow, a former officer and pilot in the United States Air Force and Air Force Reserve, appeals the dismissal of his complaint against fellow military officers. The complaint alleged that Mollnow repeatedly identified and submitted reports concerning unsafe conditions and policies in the operation of heavy jet aircraft. His suggestions were ignored. According to

* The Honorable Walter E. Craig, Senior United States District Judge, District of Arizona, sitting by designation.

the complaint, an aircraft subsequently crashed in precisely the manner Mollnow had predicted, creating an embarrassing situation for his superiors. The remainder of the complaint alleges an elaborate conspiracy to have Mollnow removed from flight duty and ultimately from the service. The conspiracy allegedly included suppression of Mollnow's reports and imprisonment in a psychiatric ward to prevent him from testifying about the crash. Mollnow was also allegedly prevented from seeking redress under the Uniform Code of Military Justice ("UCMJ") because his commanding officers refused to act on his grievances.

The complaint sought damages for direct constitutional violations under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L.Ed.2d 619 (1971), for violations of 42 U.S.C. §§ 1985 and 1986, and for numerous common law torts. Defendants, who were various of Mollnow's commanding officers or attending medical personnel, moved for dismissal contending they were immune from suit by a fellow serviceman for service-connected claims. Mollnow appealed from the grant of that dismissal.

Subsequent to oral argument in this case, the Supreme Court granted certiorari in *Wallace v. Chappell*, 661 F.2d 729 (9th Cir. 1981), *cert. granted*, — U.S. —, — S. Ct. —, 74 L.Ed.2d 276 (1982). Because we believed the Supreme Court's disposition of *Chappell* might control our decision here, we withdrew submission of this case pending *Chappell's* outcome. *Chappell*

was decided June 13, 1983, 51 U.S.L.W. 4733 (U.S. June 13, 1983), and we have received supplemental briefing concerning its effect on the present case. The present case now stands resubmitted as of the date of this decision.

I.

We begin by addressing two of Mollnow's claims for which reference to *Chappell* is unnecessary.[1] The § 1985(3) claim was properly dismissed because Mollnow did not allege that defendants' conduct was motivated by a racial or other class-based, invidiously discriminatory animus. *Griffin* v. *Breckenridge*, 403 U.S. 88, 91 S. Ct. 1790, 29 L.Ed.2d 338 (1971); *Scott* v. *Rosenberg*, 702 F.2d 1263, 1269-70 (9th Cir. 1983).

The common law tort claims were also properly dismissed. In *Lewis* v. *United States*, 663 F.2d 889 (9th Cir. 1981), *cert. denied*, — U.S. —, 102 S. Ct. 2959, 73 L.Ed.2d 1350 (1982), this court applied the *Feres* doctrine [2] to bar the wrongful death claim of a marine

1. Although the district court did not dispose of these two claims in the manner we do, we can affirm on any basis presented by the record. *M.O.S. Corp.* v. *John I. Haas Co.*, 375 F.2d 614, 617 (9th Cir. 1967).

2. In *Feres* v. *United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), the Supreme Court held that the United States is not liable, under the Federal Tort Claims Act, for injuries to military personnel which "arise out of or are in the course of activity incident to service." *Id.* at 146, 71 S.Ct. at 159, 95 L.Ed. at 161. *Feres* was broadly reaffirmed in *Stencel Aero Engineering Corp* v. *United States*, 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977).

pilot's widow who alleged her husband's death was intentionally caused. In *Bailey* v. *Van Buskirk*, 345 F.2d 298 (9th Cir. 1965), *cert. denied*, 287 U.S. 948, 86 S. Ct. 1205, 16 L.Ed.2d 210 (1966), we extended the *Feres* rationale to a serviceman's direct suit against other servicemen. *Accord Mattos* v. *United States*, 412 F.2d 793 (9th Cir. 1969). Thus, Mollnow's common law tort claims, both negligent and intentional, are barred under *Feres*.

II.

In *Chappell* v. *Wallace*, Navy enlisted men brought an action for damages and declaratory and injunctive relief against their superior officers. Their complaint alleged that the officers, in making duty assignments, submitting performance evaluations and in imposing penalties, had discriminated against the enlisted men on the basis of race in violation of their constitutional rights. The complaint also alleged a conspiracy to deprive the enlisted men of equal protection in violation of 42 U.S.C. § 1985(3).

The Supreme Court analyzed the enlisted men's direct constitutional claims in terms of whether they stated a cause of action under *Bivens*. The Court recognized that "[b]efore a *Bivens* remedy may be fashioned . . . a court must take into account any 'special factors counselling hesitation.' " 51 U.S.L.W. at 4734. The Court then reviewed the rationale of *Feres*, including "the unique disciplinary structure of the military establishment and Congress' activity in the field."

Id. at 4736. The Court determined that the *Feres* reasoning imposed " 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers. " *Id.*

In the instant case, Mollnow argues that *Chappell* does not establish a complete bar to actions by servicemen against their superiors. Mollnow relies on *Chappell's* discussion of the UCMJ, and contends a court must look to the adequacy of the remedy available under the UCMJ before dismissing. According to Mollnow, the injuries alleged in *Chappell* — undesirable duty assignments, low performance evaluations, severe penalties — were all processes subject to UCMJ review, while his allegations of interference with the performance of his duties are not. Moreover, contends Mollnow, part of the conspiracy he alleged included the intentional prevention of his access to UCMJ remedies.

We find Mollnow's distinctions unpersuasive. Under Article 138 of the UCMJ, 10 U.S.C. § 938, Mollnow was entitled to confront his commanding officer with the alleged interferences in the performance of his duties. If he was refused redress, he could then forward his "Complaint of Wrongs" to any superior commissioned officer who would in turn notify the appropriate officials to investigate the possibility of court martial. This internal military procedure may not be adequate to Mollnow's satisfaction, but it is the only remedy that Congress has made available. *Chappell* leaves no ques-

tion that the Supreme Court does not intend to imply an additional remedy.

Mollnow's most troublesome allegation is that his repeated "Complaint[s] of Wrongs" were ignored by every officer up through the chain of command, thus preventing his access to proper UCMJ review. For purposes of the dismissal of the complaint, we must assume the truth of this and all other claims. Yet we do not believe that even this allegation will survive close analysis of *Chappell.*

Chappell reversed an opinion of this court that attempted to take into account precisely the factors for which Mollnow argues. In *Wallace* v. *Chappell,* 661 F.2d 729 (9th Cir. 1981), we adopted the so-called *Mindes* [3] test for determining the reviewability of military decisions. That test would include, among other factors, the exhaustion of intraservice remedies and the potential injury to the plaintiff if review was refused. 661 F.2d at 732-33. While the Supreme Court discussed the availability of intraservice remedies in *Chappell,* it did not suggest that an inadequate intraservice remedy would change its result. On the contrary, while the Court was unwilling to say that "military personnel are barred from redress in civilian courts for all constitutional wrongs," [4] its unquestion-

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3. *Mindes* v. *Seaman,* 453 F.2d 197 (5th Cir. 1971).

4. As examples of cases where military personnel still have access to civilian courts for constitutional wrongs, the Supreme Court cited *Brown* v. *Glines,* 444 U.S. 348, 100 S.Ct. 594, 62

able holding was that "military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations." 51 U.S.L.W. at 4736. By rejecting this court's consideration of such "reviewability factors" as the adequacy of the intraservice remedy, we believe the Court necessarily imposed a *per se* prohibition on the filing of *Bivens*-type actions by servicemen against their superiors. We find no room in *Chappell* to consider the adequacy of the intraservice remedy. Thus, Mollnow *Bivens* claims were properly dismissed.[5]

III.

In *Chappell*, the Supreme Court declined to address the issue whether servicemen could maintain an action

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L.Ed.2d 540 (1980); *Parker* v. *Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974); and *Frontiero* v. *Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 37 L.Ed.2d 583 (1973). We note that none of those cases was a suit for damages against a superior officer. *Brown* involved a First Amendment attack on Air Force regulations requiring approval of a commanding officer for circulation of petitions on base; *Parker* arose in the habeas corpus context and was a vagueness challenge to criminal provisions of the UCMJ; *Frontiero* was an equal protection attack on statutes which discriminated against servicewomen in the computation of military benefits.

5. It is not necessary for us to determine whether the *Mindes*, 453 F.2d 197 (5th Cir. 1971), analysis adopted by the panel in *Chappell* v. *Wallace*, 661 F.2d 729 (9th Cir. 1981), survived the Supreme Court's decision in *Wallace* for other categories of claims. It is enough to say that the Supreme Court did not adopt it for this category of claims for which there is no *Bivens*-type relief.

against their superiors under 42 U.S.C. § 1985(3). 51 U.S.L.W. at 4736, n. 3. We need not decide that precise issue in this case because of our previous disposition of § 1985(3). We must, however, decide whether the reasoning of *Chappell* will operate to bar a serviceman's claim against his superiors under § 1985(1).

Section 1985(1) provides as follows:

> (1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of this office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;
>
> . . .
>
> (3) . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Our research discloses that § 1985(1) has been seldom discussed. The leading case addressing the provision is *Stern* v. *United States Gypsum, Inc.*, 547 F.2d 1329 (7th Cir.), *cert. denied*, 434 U.S. 975, 98 S. Ct.

533, 54 L.Ed.2d 467 (1977). In *Stern*, the Seventh Circuit interpreted § 1985(1) as protecting not only federal officers who are injured while attempting to enforce the provisions of the Fourteenth Amendment, but also those injured in the course of their day-to-day federal duties unrelated to the Fourteenth Amendment. The court arrived at that interpretation after a thorough and meticulous review of the legislative history underlying § 2 of the Civil Rights Act of 1871, the original statute from which § 1985 was codified. *Id.* at 1334-36, 1338-39. Recently, the Supreme Court engaged in a similar historical analysis of § 1985 and determined that § 1985(1), the first portion of § 1985(2), and the second portion of § 1985(3) do not require that conspirators act with intent to deprive their victims of equal protection. *Kush* v. *Rutledge*, — U.S. —, 103 S. Ct. 1483, 1486-87, — L.Ed.2d — (1983). *Accord McCord* v. *Bailey*, 636 F.2d 606, 614-17 (D.C. Cir. 1980); *cert. denied*, 451 U.S. 983, — S. Ct. —, 68 I.Ed.2d 839 (1981).

In light of the foregoing, we agree with those courts that have interpreted § 1985(1), in contrast to certain other civil rights statutes, as creating substantive rights and as not being limited to providing a remedy for the violation of a constitutional provision. *E.g.*, *Stern; Stith* v. *Barnwell*, 447 F. Supp. 970, 972-74 (M.D.N.C. 1978); *Perry* v. *Golub*, 400 F. Supp. 409 (N.D. Ala. 1975). Consequently, our disposition of Mollnow's constitutional claims under *Bivens* and § 1985(3) does not necessarily dictate dismissal of his

§ 1985(1) claim We do not perceive Mollnow's § 1985(1) claim as constitutional in origin, but rather simply as the violation of a statute. Thus, we are not faced with the question whether a statutory claim based on a constitutional violation is subject to the result announced in *Chappell*. We must decide only the narrow question whether military subordinates have a remedy under § 1985(1) against their military superiors. We hold they do not.

The precise holding of *Chappell* does not dictate the result here. *Chappell* did not establish a broad intra-service immunity against claims by servicemen. Rather, *Chappell* held only that the "unique disciplinary structure of the military and Congress' activity in the field constitute 'special factors' " militating against the recognition of a *Bivens* remedy for servicemen against their superiors. The Court's method of analysis leaves room for Congress to enact legislation authorizing servicemen's constitutional claims against their superiors.

Our analysis in this case differs from *Chappell* because § 1985(1) *is* legislation specifically authorizing suit by injured federal officers. *See Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711 (9th Cir.) (holding § 1985(1)'s protections extend only to federal officers), *cert. denied*, 454 U.S. 967, — S. Ct. —, 70 L.Ed.2d 383 (1981). In the face of such an express statutory claim, we need not consider *Bivens*' "special factors counseling hesitation." Nevertheless, the rationale of *Chappell* and *Feres* guides our decision

that military officers may not sue their superiors under § 1985(1). *Feres* is particularly helpful because, as does the present case, it involved the question whether Congress intended to allow servicemen's suits under a statute that did not expressly allow or disallow such suits.

Both the Supreme Court and this court have recognized that "[i]n the last analysis, *Feres* seems best explained by the 'peculiar and special relationship of the soldier to his superior, [and] the effects of the maintenance of such suits on discipline . . . .'" *United States* v. *Muniz*, 374 U.S. 150, 162, 83 S. Ct. 1950, —, 10 L.Ed.2d 805, 815 (1963) (quoting *United States* v. *Brown*, 348 U.S. 110, 112, 75 S. Ct. 141, —, 99 L.Ed. 139, 143 (1954)). *Accord United States* v. *Lee*, 400 F.2d 558, 563-64 (9th Cir. 1968). A § 1985(1) action would strike directly at that special military relationship, perhaps even more so than an action for negligence. In a negligence action, a spontaneous event has occurred; someone has suffered an accident and another is at fault. Under § 1985(1), however, an action would lie even for calculated decisions made in the judgment and discretion of a superior military officer, so long as the subordinate alleged the superior had interfered with his military "duties." Then a *civil* jury would be impaneled to inquire into the nature of this uniquely military matter, and damages could be assessed against the superiors for the exercise of their judgment and discretion. Such a result would offend the principles announced in *Chappell*, where the Court

stated: "Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment." 51 U.S.L.W. at 4735.

The *Chappell* case discussed at length Congress' plenary authority over the military. *Id.* In the exercise of that authority, Congress has enacted "a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure." *Id.* Section 1985(1) is completely foreign to that system. Just as the *Feres* court could identify "no American law which has ever permitted a soldier to recover for negligence" against his superiors, 340 U.S. at 141, 71 S. Ct. at —, 95 L.Ed. at 158, we know of no civilian law that would prevent superior officers, in the exercise of their wide discretion, from ordering a subordinate to refrain from performing a specific duty. The military could not function under those conditions. If the subordinate felt the order was unjust, he would have his opportunity to attack the decision before military tribunals. Congress established that procedure to address internal military matters. It obviously did not intend to supplement those internal military procedures through the enactment of § 1985(1). Accordingly, Mollnow's § 1985(1) claim was properly dismissed.

IV.

Mollnow's final claim is for relief under § 1986. Section 1986 depends on the existence of a claim under § 1985. *Williams* v. *St. Joseph Hospital*, 629 F.2d 448 452, (7th Cir. 1980). Having affirmed the dismissal of Mollnow's § 1985 claims, we also affirm the dismissal of § 1986.

Mollnow has offered other arguments, particularly with respect to his active duty status. We have considered all of those arguments and found them to be without merit. Accordingly, judgment of the district is:

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CARL J. MOLLNOW, *Plaintiff,*	)	No. C79-127T
v.	)	
PAUL K. CARLTON, et al., *Defendants.*	)	ORDER

THIS MATTER comes on before the undersigned judge of the above-entitled court upon Defendant's Motion to Dismiss. The Court having considered the aforesaid motion, together with the memorandum and affidavits, and having reviewed the entire file herein, now, therefore, it is

ORDERED that Defendant's Motion to Dismiss be and the same is GRANTED.

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record.

DATED this 8th day of October, 1980.

.....

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December, 1983, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid to Gene S. Anderson / Robert M. Taylor, United States Attorney Office, 3600 Seafirst Fifth Avenue Plaza, 800 Fifth Avenue, Seattle, Washington 98104, Counsel for Respondents. I further certify that all parties required to be served have been served.

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FILED
FEB 27 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-994

In the Supreme Court of the United States

OCTOBER TERM, 1983

CARL J. MOLLNOW, PETITIONER

v.

PAUL K. CARLTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1983

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CARL J. MOLLNOW, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner, a former Air Force officer, seeks damages from other Air Force officers for alleged wrongs incident to military service.

1. Petitioner brought this action against respondents, 14 Air Force officers. Petitioner asserts that while he was in the Air Force, he made several complaints about flight safety hazards. He alleges that respondents suppressed his complaints and warnings and in retaliation for them engaged in an elaborate conspiracy to take a variety of actions against petitioner, including removing him from flight duty, imprisoning him in a psychiatric ward, and ultimately causing him to be involuntarily discharged from the Air Force. Pet. App. 1-2. Petitioner sought damages for violations of the Constitution (see *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)), for violations of 42 U.S.C. 1985(1) and (3), and for common law torts.

The United States District Court for the Western District of Washington dismissed the complaint (Pet. App. 14), and the court of appeals affirmed (*id.* at 1-3). The court of appeals rejected petitioner's claim under 42 U.S.C. 1985(3) on the ground that petitioner "did not allege that [respondents'] conduct was motivated by a racial or other class-based, invidiously discriminatory animus" (Pet. App. 3). The court also upheld the dismissal of petitioner's common law tort claims, ruling that the policies of *Feres* v. *United States*, 340 U.S. 135 (1950) — which held that servicemen may not sue the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671 *et seq.*, for injuries incident to military service — preclude a tort suit by a serviceman against his fellow officers (Pet. App. 3-4).

The court of appeals then held (Pet. App. 4-7) that petitioner's *Bivens* action against his fellow officers was barred by *Chappell* v. *Wallace*, No. 82-167 (June 13, 1983). Finally, the court of appeals affirmed the dismissal of petitioner's claims under 42 U.S.C. 1985(1) on the basis of *Feres* and *Chappell*. The court of appeals reasoned that in *Feres* this Court held that Congress did not "intend[] to allow servicemen's suits under a statute that [like 42 U.S.C. 1985(1)] did not expressly allow or disallow such suits" (Pet. App. 11), and that in *Chappell* this Court counseled against permitting servicemen to sue their superior officers for damages in the absence of express congressional authorization. The court of appeals explained (Pet. App. 11-12 (emphasis in original)):

> A § 1985(1) action would strike directly at th[e] special military relationship * * *. Under § 1985(1), * * * an action would lie even for calculated decisions made in the judgment and discretion of a superior military officer * * *. Then a *civil* jury would be impaneled to inquire into the nature of this uniquely military matter, and damages could be assessed against the superiors

> for the exercise of their judgment and discretion. Such a result would offend the principles announced in *Chappell* * * *.
>
> * * * Congress * * * obviously did not intend to supplement * * * internal military procedures through the enactment of § 1985(1).

2. Petitioner's claim appears to be that, notwithstanding *Chappell* v. *Wallace*, he should be allowed to bring a *Bivens* action against military officers for alleged constitutional wrongs incident to his military service because the internal military remedies available to him were inadequate.[1] This contention is incorrect.

First, the clear holding of *Chappell* is that "enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations" (slip op. 9 (footnote omitted)). This holding was not contingent on whether a particular serviceman plaintiff could invoke alternative remedies. The Court discussed the alternative remedies potentially available to the *Chappell* plaintiffs only in connection with its observation that "Congress'

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[1]Petitioner contends (Pet. 17-19) that he was not on "active duty" at the time the alleged wrongs were committed against him. But the complaint itself asserts that the alleged wrongs occurred prior to petitioner's 1978 discharge from the Air Force (Complaint, paras. 7-28), and petitioner does not suggest that he was on leave or otherwise engaged in activities unconnected to military service at the time of his alleged injuries (cf. *Brooks* v. *United States*, 337 U.S. 49 (1949)). All of the wrongs are alleged to have been committed by petitioner's fellow military officers were in connection with military affairs; thus petitioner's claims implicate "the unique disciplinary structure of the military establishment" (*Chappell*, slip op. 8).

It appears that petitioner's claim that he was not on active duty status is merely a way of asserting that his superiors were not giving him the degree of responsibility to which he thought he was entitled. See, *e.g.*, Pet. 18 (alleging that respondents "downgrad[ed] [petitioner] from active duty into a status *persona non grata*").

activity in the field" is one of the " 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers" (slip op. 8).

Second, petitioner has not shown that he lacked adequate alternative remedies. The petition itself states that petitioner "repeatedly submitted 'Complaint[s] of Wrongs' to every officer up through the chain of command" (Pet. 9). This is the remedy prescribed by Article 138 of the Uniform Code of Military Justice, 10 U.S.C. 938, and specifically mentioned in *Chappell* (slip op. 6-7). Petitioner's contention (Pet. 9) appears to be that his superior officers did not take action on these complaints. But that does not mean the remedies were unavailable or inadequate; it simply means that petitioner was unsuccessful in invoking them. A claimant cannot demonstrate the inadequacy of an alternative remedial mechanism merely by charging that those who administer it are parties to a conspiracy with those who allegedly wronged him.

Finally, petitioner does not explain why he could not invoke other internal military remedies. For example, it appears that petitioner could have sought relief from a board for the correction of military records, another remedy mentioned in *Chappell* (slip op. 7). The Board for the Correction of Air Force Records has the authority to "correct any military record of [the Air Force] when * * * necessary to correct an error or remove an injustice" (10 U.S.C. 1552(a)) and its decisions are subject to judicial review (see *Chappell*, slip op. 7). Thus the Board presumably could have provided petitioner with relief from his allegedly unlawful discharge and improper psychiatric evaluation. Petitioner does not claim that the Board, which is composed of civilians, was biased against him or was a part of a conspiracy against him.

3. Petitioner does not appear to challenge the court of appeals' rulings on his common law or statutory claims. In any event, those rulings are correct. As many courts have recognized, the policies underlying *Feres* preclude servicemen from suing their superior officers for common law torts. See, *e.g.*, *Hass* v. *United States*, 518 F.2d 1138, 1143 (4th Cir. 1975); *Mattos* v. *United States*, 412 F.2d 793 (9th Cir. 1969); *Bailey* v. *DeQuevedo*, 375 F.2d 72, 73-74 (3d Cir.), cert. denied, 389 U.S. 923 (1967); *Bailey* v. *Van Buskirk*, 345 F.2d 298 (9th Cir. 1965), cert. denied, 383 U.S. 948 (1966). See also *Feres*, 340 U.S. at 141 (footnote omitted) ("We know of no American law which ever has ever permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving."). Moreover, respondents are entitled to absolute immunity from common law tort actions. See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 807-808 (1982); *Butz* v. *Economou*, 438 U.S. 478, 495 (1978); *Barr* v. *Matteo*, 360 U.S. 564 (1959).

Similarly, petitioner suggests no reason to question the court of appeals' conclusion that 42 U.S.C. 1985(1) does not permit a serviceman to challenge an adverse personnel action by bringing a suit for personal damages against his military superiors. Certainly when Congress enacted what is now Section 1985(1) as part of the Civil Rights Act of 1871 (ch. 22, § 2, 17 Stat. 13), it did not believe it was granting such an extraordinary remedy to servicemen. Moreover, as the court of appeals noted, it follows *a fortiori* from *Feres* that courts should not create such a personal damages remedy on the basis of Section 1985(1). The case for allowing servicemen's suits under the Federal Tort Claims Act is stronger than that for allowing such suits under Section 1985(1);[2] and FTCA actions, which seek

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[2]The FTCA specifically includes "members of the military and naval forces" in its definition of "[e]mployees of the government" (28 U.S.C. (& Supp. V) 2671), thus revealing that Congress expected the torts of

damages from the government, are far less disruptive of military discipline than suits seeking damages against military officers in their personal capacities.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FEBRUARY 1984

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military officials to give rise to liability on the part of the United States in some contexts. Moreover, the FTCA contains several express exceptions, including an exception for "combatant activities of the military or naval forces * * * during time of war" (28 U.S.C. 2680(j)), but it contains no express exception for torts committed by one serviceman against another. There are no remotely comparable indications, in the text of Section 1985(1), that Congress intended to permit litigation arising out of military activities, particularly internal military disciplinary decisions.

[3]The court of appeals was also plainly correct in concluding that petitioner cannot maintain an action under 42 U.S.C. 1985(3) because he has alleged no " 'racial, or * * * otherwise class-based, invidiously discriminatory animus behind the conspirators' action' " (*United Brotherhood of Carpenters, Local 610* v. *Scott*, No. 82-486 (July 5, 1983), slip op. 8, quoting *Griffin* v. *Breckenridge*, 403 U.S. 88, 102 (1971)).

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No. 83-994

In the Supreme Court
of the United States

OCTOBER TERM, 1983

CARL J. MOLLNOW,
Petitioner,

v.

PAUL K. CARLTON, et al,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITION FOR WRIT OF CERTIORARI

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CARL J. MOLLNOW,
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITION FOR WRIT OF CERTIORARI

Respondents oppose the Petition for a Writ of Certiorari upon the grounds that presumably Petitioner's statutory and *Bivens*-type claims cannot be applied against fellow servicemen, even if the intramilitary remedy is completely unavailable and inadequate. In addition, Respondents assert that Petitioner has not

exhausted all the alternative remedies available, nor has he challenged dismissals of his causes of action under 42 U.S.C. §1985(1) and (3), and one *Bivens*-type claim. All of Respondents' assertions are in error.

1. A BIVENS-type claim may arise against military servicemen where they completely deprive Petitioner of any other form of redress or review.

Reliance upon *Chappell* v. *Wallace*, 103 S. Ct. 2362 (1983) for the premise that a *Feres* immunity applies to all military servicemen, regardless of the availability of an adequate military remedy, is misplaced. The *Chappell* decision is inextricably tied to the reasoning for a serviceman's immunity enunciated in *Feres* v. *United States*, 340 U.S. 135 (1950). The *Feres* Court created this form of immunity only because Congress had already established an internal military remedy program. The Court deemed the composite of these remedies as an adequate alternative to other forms of damages claims. However, the immunity is not statutory but judicially created. The reasoning for its existence clearly includes the requirement that there be adequate compensable remedies available within the military system. *Feres* v. *United States*, *supra* at 144-146.

Respondents suggest that the mere existence "on paper" of the various military remedies should be sufficient to prevent Civil Right Act and *Bivens*-type claims. Congress, however, does not create statutory

remedies with the intention that they will not be made available. Where, as here, the entire array of military related remedies are intentionally blocked by Respondents, Congress's "activity in the field" has been utterly destroyed. There are no longer any "special factors" counseling caution for a judicial review.

Indeed, there is no indication that Congress even considered precluding the use of judicial review where the reviewing military officers conspired to prevent the availability or exercise of the statutory remedies. This Court has recently recognized that such "* * * silence takes on added significance in light of Congress's failure to provide any federal remedy for persons injured by such conduct. It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood* v. *Kerr-McGee Corp.*, 104 S. Ct. 615, 623 (1984).

Finally, Respondents misconstrue the doctrine of exhaustion of administrative remedies. Petitioner's duty is to apply for those remedies. If his applications are refused, he has done all that is required. It is not within Petitioner's power to grant himself a review. Here, Petitioner went further and repeatedly applied for such reviews with the result of consistent denials. Petitioner may be unique, but his case does fall within the extreme example where he either exhausted or was prevented by Respondents from exhausting virtually all of the alternative remedies envisioned by Congress.

2. Petitioner did exhaust and was precluded by Respondents from reinitiating a review by the Board for Correction of Air Force Records.

Contrary to Respondents' assertion, Petitioner, in fact, duly made application for review of his grievances under 10 U.S.C. §1552. His application for review by the Board for Correction of Air Force Records was refused. After his court martial proceeding, Petitioner's military attorneys again attempted to exercise this remedy and were prevented from doing so by the Respondents. Petitioner's Complaint includes specific allegations identifying this interference by Respondents and Petitioner's exhaustion of all other forms of statutory and regulatory remedies.

Presumably, the absence of a discussion of a 10 U.S.C. §1552 remedy in the Court of Appeals' opinion was due to a recognition that such remedy is not meant to be either mandatory or exclusive. See, *Bolger* v. *Marshall*, 193 F.2d 37 (1951); *Reed* v. *Franke*, 187 F. Supp. 905, *aff'd*, 297 F.2d 17 (4th Cir. 1960); *Sherengos* v. *Seamans*, 449 F.2d 333 (4th Cir. 1971). Boards for the Correction of Military Records are not required to grant hearings to all applicants. There is no statutory right to a hearing under this provision. *Flute* v. *United States*, 535 F.2d 624 (1976); *Armstrong* v. *United States*, 205 Ct. Cl. 754 (1974); *Courtney* v. *Secretary of Air Force*, 267 F. Supp. 305 (D.C. Cal. 1967). In fact, the remedy would not be adequate as such boards may not award money dam-

ages for constitutional torts. Nor may they provide for reinstatement of servicemen after they were reassigned from active to nonactive duty status. See, *VonHoftburg* v. *Alexander*, 615 F.2d 633 (5th Cir. 1980); *Rolles* v. *Civil Service Commission*, 512 F.2d 1319 (D.C. Cir. 1975); 41 Op. Atty. Gen., October 11, 1948.

The failure of military personnel to seek relief from an Air Force Board for Correction of Military Records does not even deprive federal courts of jurisdiction over a serviceman's action. *Rolles* v. *Civil Service Commission, supra; Ogden* v. *Zuckert*, 298 F.2d 312 (1961); *Withum* v. *O'Conner*, 506 F. Supp. 1374 (D.C. Puerto Rico, 1981). Exhaustion of the 10 U.S.C. §1552 remedy is not required. See also, *June* v. *Secretary of Navy*, 557 F. Supp. 144 (D.C. Pa. 1982); *Friedman* v. *United States*, 310 F.2d 381, cert. den., 373 U.S. 932, 83 S. Ct. 1540, 10 L. Ed.2d 691 (1962).

3. Petitioner challenges the dismissal of each cause of action in his Complaint.

The first and principal cause of action involves a violation under 42 U.S.C. §1985(1) as the Respondents conspired to molest, interrupt, hinder and impede Petitioner from carrying out the lawful discharge of his duties of office. Alternatively, the Complaint also alleges a 42 U.S.C. §1985(3) claim and two direct constitutional or *Bivens*-type claims. Finally, a corresponding claim is made under 42 U.S.C. §1986.

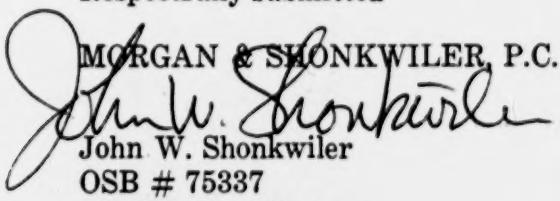
Petitioner's second *Bivens*-type claim has been misconstrued by the Respondents, and thereby the Court of Appeals, as a claim for common law torts. The two *Bivens*-type claims are based upon constitutional torts, not common law torts. The essential difference in the pleadings of these two alternative actions is that one alleges violations of constitutionally protected rights as being done within the scope of military employment. The other action alleges the acts were committed outside the scope of that employment.

Petitioner's 42 U.S.C. §1985(3) claim is supported by specific allegations in the Complaint establishing that Petitioner falls within a class to be protected under the statute and that the acts of the Respondents were done with discriminatory animus against that class. *Griffen* v. *Breckenridge*, 403 U.S. 88 (1971); *Allee* v. *Medrano*, 416 U.S. 802 (1974). Finally, Respondents attempt to rewrite Petitioner's Complaint to dispute the extensive period of time Petitioner was taken off active duty, stripped of regular duty status, and barred from entry on any military installation of the United States. The allegations in the Complaint are clear and provable. Respondents chose to place Petitioner in a status of *Persona non grata* to prevent any initiating of a military review outside the conspiratorial cadre. Thus, the Petitioner was completely isolated from the established military review and record structure.

CONCLUSION

For these reasons a writ should issue and the dismissal of each of the Petitioner's causes of action should ultimately be reversed.

Respectfully submitted



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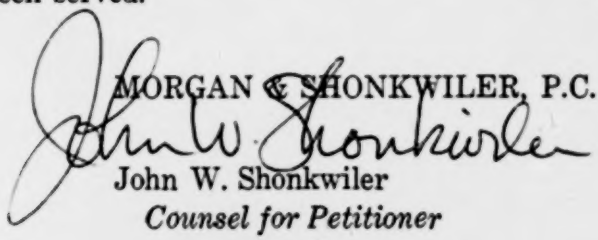
CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March, 1984, three copies of the Reply Brief for Petition for Writ of Certiorari were mailed, postage prepaid, to Rex E. Lee, Solicitor General, Department of Justice, Washington, D.C. 20530; and to Gene S. Anderson/ Robert M. Taylor, United States Attorney Office, 3600 Seafirst Fifth Avenue Plaza, 800 Fifth Avenue, Seattle, Washington 98104, Counsel for Respondents. I further certify that all parties required to be served have been served.



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